Filed 2/17/15 In re J.C. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.C., Defendant and Appellant.	E061403 (Super.Ct.No. RIJ1301182) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** [NO CHANGE IN JUDGMENT]

The petition for rehearing is denied. The opinion filed in this matter on January 26, 2015, is modified as follows:

1. On page 12, in the last full paragraph (beginning, "A challenge to the constitutionality"), the second sentence is modified by adding the words, "in general," as follows:

In general, the appellate court reviews a juvenile court's imposition of a probate condition for abuse of discretion. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 7.)

2. On page 12, in the last full paragraph (beginning, "A challenge to the constitutionality"), a third sentence is added, as follows:

However, when a constitutionality of a juvenile probation condition is at issue, we apply the de novo standard of review. (*In re Shaun R.* (2010) 188 Cal.app.4th 1129, 1143.)

Except for these modifications, the opinion remains unchanged. The modifications do not affect a change in the judgment.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.

Filed 1/26/15 In re J.C. CA4/2 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.C., Defendant and Appellant.	E061403 (Super.Ct.No. RIJ1301182) OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge. Affirmed as modified.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

On October 24, 2013, a petition under Welfare and Institutions Code section 602[1] alleged that plaintiff and appellant J.C. (minor) committed two counts of possession of child pornography.[2] (Pen. Code, § 311.11) After a fitness hearing wherein the court found minor fit for juvenile court, minor admitted both allegations.

On April 24, 2014, the juvenile court ordered minor placed in the Riverside County Youthful Offender Program (YOP) for no more than 365 days, and granted minor probation upon his release with various terms and conditions. The court also imposed a fine of $200.

On appeal, minor claims that (1) the juvenile court abused its discretion in placing minor in YOP; and (2) some of the conditions of probation are unconstitutionally vague. We agree with minor that two of the conditions are unconstitutionally vague and must be modified to add a knowledge requirement. In all other respects, the juvenile court's disposition is affirmed.

FACTUAL AND PROCEDURAL HISTORY[3]

A. INCIDENT

On May 8, 2013, representatives from the social networking website Facebook contacted the National Center for Mission and Exploited Children to report the upload of

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Minor was 17 years old at the time the petition was filed.

[3] Minor pled guilty. Therefore, the statement of facts is derived from the probation report.

images of a nude, prepubescent boy with his genitalia and anal area exposed. Facebook provided investigators with the email address associated with the account that uploaded the image.

On June 3, 2013, a search warrant was served on Google, Inc., and AT&T. Google provided email folders for the email account identified by Facebook. The email folders contained numerous Facebook friend requests from homosexual adult males and teenage boys. The Internet Protocol (IP) used to upload the images to Facebook was traced to the home of minor's father in Eastvale, California. At the time of the investigation, minor lived in the family home with his father, mother, and seven-year-old sister.

On July 15 and July 23, 2013, the online mobile photograph and video-sharing website Instagram reported possible child pornography uploaded to their site. The investigator determined the images depicted boys between the ages of five and 10 engaging in sex acts with other young boys or adults. These images were uploaded from the same IP address as the Facebook images.

On September 4, 2013, a search warrant was served on minor's family's home. Minor's mother stated that minor had his own laptop, which investigators found in minor's room. The laptop contained two images and 14 videos of child pornography. Minor admitted that he uploaded the pornographic images to Facebook and Instagram. He said he stored his child pornography collection on his email account, and that he obtained the images and videos from other users on social media websites. Minor admitted that he was sexually attracted to children as young as five years old, and that he

knew it was illegal and morally wrong to view and possess child pornography. He said, however, that "his sexual desires and fantasies about molesting children far outweighed his thoughts of legal consequences." Minor said he uploaded the pornographic images to let others know "they were not alone in their sexual desires for children." Minor said he never acted on his desires to molest children, but he admitted he had consensual sexual intercourse with someone he believed to be 14 years old.

B. PRIOR INCIDENT

When minor was five or six years old, he was often left in the care of his maternal grandparents. He would sometimes sleep at their house, along with his three older male cousins. At night, minor's grandparents would shut their door and minor would sleep in the living room. Two of minor's cousins repeatedly engaged in oral sex with minor during this time period. Minor saw several psychologists after the molestation, but was unable to remember whether these sessions helped.

C. DISPOSITION RECOMMENDATIONS

At the fitness hearing under section 707, subdivision (a)(1), minor called Dr. Robert Lark to testify on his behalf. Dr. Lark is a clinical psychologist, a marriage and family therapist, and a "master addiction counselor." Dr. Lark testified that he diagnosed minor with "Post-Traumatic Stress Disorder, sexual abuse of a child, and depressive disorder not otherwise specified." Dr. Lark did not diagnose minor with paraphilia or pedophilia. He recommended that minor receive 52 weeks of individual therapy, participate in a 12-step program, and possibly participate in eye-movement desensitization and reprocessing therapy. Dr. Lark stated there was no national standard

for treating juvenile sex offenders, but the typical protocol used in therapy with young offenders was to provide them with various techniques to manage their behavior.

The Juvenile Services Division Intra-agency Screening Committee unanimously agreed that minor should be placed in a secured facility—preferably the YOP. Based on minor's offense pattern and danger to the community, the committee concluded that minor was not suitable for probation and should not be placed in a traditional outpatient program. The probation officer noted, "The structured treatment program in such placement will allow the minor at least six months of sexual offender treatment with further referrals to adult programs in the community upon his release." Accordingly, the probation officer recommended a placement in YPO for up to 365 days.

DISCUSSION

A. MINOR'S PLACEMENT IN YOP

Minor contends that the juvenile court abused its discretion by placing him in YOP because it is contrary to his best interests.

"'An order of disposition, made by the juvenile court, may be reversed by the appellate court only upon a showing of an abuse of discretion. . . .' [Citation.] It is not the responsibility of [the] court to determine what [it] believe[s] would be the most appropriate placement for a minor." (*In re Khamphouy S.* (1993) 12 Cal.App.4th 1130, 1135.) Exercise of the court's discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The reviewing court must consider "all reasonable

inferences to support the decision of the juvenile court . . . ." (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) The court's findings will not be disturbed if there is substantial evidence to support the placement. (*Ibid.*)

At the disposition hearing, minor argued that the juvenile court should follow the recommendation of Dr. Lark: A 52-week outpatient, individualized therapy program and a long-term 12-step program. Minor offered the court no alternative placement options, other than releasing him to his parents. The prosecutor argued that the court should adopt the probation officer's recommendation of up to 365 days in a secured facility, preferably YOP. The probation officer informed the court that YPO would offer some treatment. The record indicates that the court read and considered the probation report and Dr. Lark's report. Thereafter, the court placed minor in Riverside County YOP for no more than 365 days.

The purpose of the juvenile justice system is to rehabilitate the minor offender and to protect public safety. (§ 202, subds. (a) & (b).) If a minor is determined to be a ward of the court, the court may "make any reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor. . . ." (§ 727, subd. (a)(1).) When a minor is to receive care, treatment and guidance while under the jurisdiction of the juvenile court, it shall be consistent with their best interest, hold the minor accountable for his/her behavior, and appropriate for his/her circumstances. (§ 202, subd. (b).) In determining a minor's disposition, the juvenile court should consider the "safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor." (§ 202, subd. (d).)

Here, the juvenile court ordered minor placed at YOP for no more than 365 days. In reaching this conclusion, the court heard testimony from the probation officer and read Dr. Lark's report. The probation officer, in discussing the program available at YOP, stated that YOP provided programs "like an 18-month or 2-year program." "They start the first six months in YOP and then transition him to that outpatient program." The officer then concluded, "So I do believe that YOP is appropriate. Not just from the confinement standpoint, but also from the treatment program. And we're not recommending that we lock him up and throw away the key. We are recommending that he start the treatment there and continue it afterwards."

After considering the evidence presented, the trial court thoughtfully stated: "Well, this is among the most disturbing and difficult cases we've had in this Court, primarily because we know that paraphilia is a very difficult disorder to treat and we know the consequences of it are devastating to those who are affected by the behavior. [¶] The—it seems to me that the information before the Court demonstrates that if the minor is not reoffending right now, he's very much at risk of doing that. And the question is who should bear that risk, the community, or should the risk be minimized by while he's treated having him in a safe and secure environment."

Thereafter, the court reached its decision: "I'm going to follow the recommendation of the probation officer in this case and adjudge the minor a ward and commit him to the Riverside County Youthful Offender Program for a period not to exceed 365 days on all the terms and conditions set forth in the recommendation."

The court carefully balanced the rehabilitative needs of minor and the protection to society when ordering minor to YOP. We discern no abuse of discretion.

As noted above, minor admitted to uploading pornographic images of young children on the Internet via Instagram and Facebook. Moreover, a collection of child pornography pictures and videos were found on his laptop. Minor had sex with someone he believed to be 14 years old. He also admitted that his urges were stronger than the threat of legal consequences. The probation officer expressed concern that if minor were not confined, "there is every likelihood [that minor] would repeat his offenses and continue to prey on children."

However, minor argues that he "has never preyed on children. A one year placement in a locked facility is not necessary to protect the public in this case." We disagree. The consumption of child pornography fosters its creation, and therefore perpetuates the victimization of highly vulnerable victims. The child pornography possessed by minor depicted children as young as five being sexually exploited. Moreover, minor admitted that he distributed these images on the Internet to reach out to others who desire to have sex with children. Therefore, placing minor in YOP provided safety and protection to some of society's most vulnerable victims.

Moreover, minor contends that his YOP placement is contrary to his best interest since YOP does not offer "individualized therapy." Although YOP may not provide the precise treatment minor's expert recommended, it does provide a sexual offender treatment. The probation officer described that program as "what you would receive outside the community. There's . . . like an 18-month or 2-year program. They start the

first six months in YOP and then transition him to that outpatient program, similar to what [minor's counsel was] talking about, only longer." Here, we emphasize that the court cannot simply look at minor's best interest alone. It must balance this consideration with the protection and safety of the community. In this case, by placing minor in YOP, the court could ensure both (1) minor would receive treatment, and (2) the public would be protected against what minor himself acknowledged were overwhelming sexual urges.

Furthermore, minor raises a new argument in his reply brief. Minor argues that the juvenile court abused its discretion because "the court did not consider the appropriateness or effectiveness of other less restrictive alternatives." Because minor belatedly raised the argument for the first time in his reply brief, we conclude he has forfeited the argument for purposes of this appeal. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453; see also *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant"]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 ["We refuse to consider the new issues raised by defendant in his reply brief"].)

Even if we were to consider minor's argument, we find it to be without merit. In support of his argument, minor relies on *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576: "To uphold a juvenile court's disposition order there must be evidence in the record supporting a determination that less restrictive alternatives are ineffective or

inappropriate." In *Teofilio*, at the dispositional hearing, the court read and considered the probation officer's report. The report recommended a commitment to the CYA as the most appropriate disposition in the matter. "No further evidence was taken, and though defendant's counsel was present, she presented no argument." (*Id.* at p. 575.) The court, based on the report, committed the minor to CYA. (*Ibid.*) The appellate court, in reversing the juvenile court, noted: "The only evidence before the court was from the probation officer's report, and therefore, we must presume the judge predicated his disposition upon this report. However, the report fails to show the probation officer considered less restrictive alternatives or why such alternatives would be ineffective or inappropriate. This leaves the record barren on this crucial issue." (*Id.* at p. 577.)

The facts in this case are distinguishable. Here, minor's counsel submitted a letter from Dr. Lark, which was considered and discussed at the disposition hearing. Moreover, minor's counsel vigorously discussed the outpatient treatment option discussed in Dr. Lark's letter. The court, therefore, considered the appropriateness or effectiveness of other less restrictive alternatives, unlike the court in *In re Teofilio*, *supra*. After considering the alternatives, the juvenile court found that continuing to place minor in the custody of his parents, even with treatment, would be contrary to his welfare.

Based on the above, we hold that the trial court did not abuse its discretion in placing minor at YOP. Given the nature of the crimes committed by minor, it may have been an abuse of discretion to do otherwise.

B. PROBATION CONDITIONS

Minor contends that probation condition Nos. 2(a), 2(j), and 2(k) are unconstitutionally vague because he could unknowingly violate them. The People concede that probation condition numbers 2(k) and 2(j) need to be modified to add the scienter requirement. The People, however, contend that probation condition No. 2(a) needs no modification. For the reasons set forth below, we agree with the People.

Where the juvenile court places a minor on probation following the minor's commission of a crime, it "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (§ 730, subd. (b).) "'Because of its rehabilitative function, the juvenile court has broad discretion when formulating conditions of probation. "A condition of probation which is impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court." [Citation.] "[I]n planning the conditions of appellant's supervision, the juvenile court must consider not only the circumstances of the crime but also the minor's entire social history. [Citations.]" [Citation.]' [Citations.] 'Even conditions which infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of the juvenile [citation].' [Citations.] But every juvenile probation condition must be made to fit the circumstances and the minor." (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203.)

Despite the greater latitude afforded juvenile courts in ordering probation conditions, however, it remains the law in all cases that "[a] probation condition 'must be

sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) In addition, a probation condition that imposes limitations on a person's constitutional right "must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Id.* at p. 890; see also *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1331 [probation condition against minor restricting him from associating with probationers was not overbroad where minor had previously been in trouble for fighting an alleged gang member, and the restriction was thus "sufficiently related to the goals of (1) promoting his rehabilitation and reformation, and (2) protecting the public"].)

A challenge to the constitutionality of a probation condition may be raised for the first time on appeal. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 885.) The appellate court reviews a juvenile court's imposition of a probation condition for abuse of discretion. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 7.)

1. *PROBATION CONDITION NUMBER 2(A) SHOULD NOT BE MODIFIED*

Probation condition No. 2(a) prohibits minor from violating any "law, ordinance, or court order." Minor contends that this probation condition is unconstitutionally vague. We disagree. This condition is explicit about what conduct is prohibited. Although minor argues that he is not an attorney and, therefore, should not be expected to know all federal and state laws, or every ordinance imposed by a city or town, "all citizens are

presumptively charged with knowledge of the law." (*Atkins v. Parker* (1985) 472 U.S. 115, 130.) Accordingly, we find that probation condition number 2(a) is not vague.

2. *PROBATION CONDITION NUMBER 2(J) SHOULD BE MODIFIED*

Probation condition No. 2(j) provides that minor shall not "possess sexually explicit materials." Minor argues that this condition is unconstitutionally vague, and urges us to modify the condition to that he must not *knowingly* possess such materials. The People agree.

Therefore, we hereby order probation condition number 2(j) to be modified, by adding the scienter requirement, as follows: "Not knowingly possess sexually explicit materials[.]"

3. *PROBATION CONDITION NUMBER 2(K) SHOULD BE MODIFIED*

Probation condition number 2(k) prohibits "contact with any male or female under the age of 14 years, unless accompanied by an informed, responsible adult, approved by the Probation Officer." Minor contends that this condition is unconstitutionally vague because he could violate it unknowingly. The People agree.

Therefore, we hereby order probation condition number 2(k) to be modified, by adding the scienter requirement, as follows: "Not knowingly have contact with any male or female under the age of 14 years, unless accompanied by an informed, responsible adult, approved by the Probation Officer."

DISPOSITION

For the reasons stated, *ante*, we order the conditions of probation modified in the following respects:

Probation condition No. 2(j) is modified to read: "Not knowingly possess sexually explicit materials."

Probation condition No. 2(k) is modified to read: "Not knowingly have contact with any male or female under the age of 14 years, unless accompanied by an informed, responsible adult, approved by the Probation Officer."

As so modified, the juvenile court's disposition is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.